SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 788

JAMES D. McCOLLOUGH, *Petitioner*

v.

THE TRAVELERS INSURANCE COMPANY
AND
LEVINGSTON SHIPBUILDING COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI

To The United States Court Of Appeals
For The Fifth Circuit

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	7
I. That his injury is within the jurisdiction of the Longshoremen's and Harborworker's Compensation Act because he was engaged in maritime employment within the admiralty jurisdiction of the United States.	9
II. That in any event (even though the Petitioner urges the broader doctrine), an injury occurring upon the floating outfitting pier is an injury upon the navigable waters within the meaning and coverage of the Longshoremen's Act.	15
III. At any rate, the injury here occurred within the twilight area of legitimate doubt where the statutory presumption of coverage supports the claimant's election and the deputy commissioner's award.	25
Conclusion	28

LIST OF AUTHORITIES

CASES	Page
Avondale Marine Ways v. Henderson, 346 U.S. 366, 367 (1953)	20, 27
Boston Metal Co. v. O'Hearne, 329 F.2d 504 (4th Cir. 1964)	11
Calbeck v. Traveler's Insurance Co., 370 U.S. 114, 82 S.Ct. 1196 (1962)	8, 14, 16, 18, 21, 27

CASES

Page

City of Oakland v. Hogan, 41 C.A.2d 333, 106 Pac.2d 987 (1940) 24
Continental Casualty Co. v. Lawson, 64 F.2d 802, 805 (5th Cir. 1933) 20
Davis v. Department of Labor and Industries, 317 U.S. 249, 63 S.Ct. 225 (1942) 10, 26, 27, 28
Dixon v. Oosting, 238 F. Supp. 25 (E.D. Va. 1965) 7
Grant Smith-Porter v. Rohde, 257 U.S. 469 (1922) 17
Great Lakes D. & D. Co. v. Kierejewski, 261 U.S. 479 (1923) 21
Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 83 S.Ct. 1185 (1963) 10, 11 12
Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272, 273 (1959) 26
Holland v. Harrison Bros., 306 F.2d 369 (5th Cir. 1962) 20, 22
Huff v. Matson Navigation Co., 338 F.2d 205 (9th Cir. 1964) 10
Industrial Commission v. Nordenholt, 259 U.S. 263 (1922) 17
In Re: Waterfront, 122 Misc. 863, 205 N.Y.S. 56 (1924) 24
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 16
Maryland Casualty Co. v. Lawson, 101 F.2d 732, 733 (5th Cir. 1939) 20
Messel v. Foundation Co., 274 U.S. 427, 434 (1926) 21
Meyers v. Kansas City, 323 Mo. 200, 18 S.W.2d 900 (1929) 24
Moore's Case, 323 Mass. 162, 167, 80 N.E.2d 478, aff'd per curiam sub. nom. Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948) 27
O'Keeffe v. Atlantic Stevedoring Co., 354 F.2d 48, 50 (5th Cir. 1965) 15, 19, 28
Port Houston Iron Works v. Calbeck, 227 F. Supp. 966, 967 (S.D. Tex. 1964) 20

CASES	Page
Reed v. The Yaka, 373 U.S. 410, 83 S.Ct. 1349 (1963)	13, 22, 24
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	16
Spann v. Lauritzen, 344 F.2d 204 (3rd Cir. 1965)	10
Thompson v. Calmar Steamship Corp., 216 F. Supp. 234 (E.D. Pa. 1963), aff'd. 331 F.2d 657 (3rd Cir. 1964), cert. den. 379 U.S. 913, 85 S. Ct. 259	10
United States v. Yee Nee How, 105 F. Supp. 517 (N.D. Calif. 1952)	23
Washington v. Dawson, 264 U.S. 219 (1924)	16

UNITED STATES STATUTES	
28 U.S.C. 1257(3)	2
33 U.S.C. 901 et seq.	2, 8
46 U.S.C. 740	2

MISCELLANEOUS	
Hearings on S. 3170, Senate Judiciary Committee 69th Cong., 1st Sess., p. 2	17
S. Rep. 973, 69th Cong., 1st Sess., p. 16	18
H. Rep. 1190, 69th Cong., 1st Sess., p. 1	18

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The Petitioner, James D. McCollough, prays that a writ of certiorari issue to review the judgment entered in this case by the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Texas, Beaumont Division, was entered on December 10, 1965 (Tr. 19-21), and is reported in 19 A.M.C. 1258. The opinion of the United States Court of Appeals for the Fifth Circuit was entered on August 9, 1967 and is reported in _____ F.2d.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 9, 1967. (Tr. 42-54). The jurisdiction of this court is invoked under 28 U. S. Code 1257(3).

QUESTION PRESENTED

Whether the Petitioner's injury occurred upon the navigable waters of the United States, thus entitling him to benefits under the Longshoremen's and Harborworker's Compensation Act, 33 U.S.C. 901 *et seq.*

STATUTES INVOLVED

The Statutes involved in this case are:

(a) Longshoremen's and Harborworker's Compensation Act, 1927, 33 U.S.C. 901, *et seq.*

(b) Admiralty Extension Act, 1948, 46 U.S.C. 740.

STATEMENT

This is an appeal from a final judgment of the Court of Appeals for the Fifth Circuit which reversed a decision by the Disrict Court of the Eastern District of Texas which had upheld the Deputy Commissioner's award of benefits under the Longshoremen's and Harborworker's Act, 33 U.S.C. 901 *et seq.*, to James J. McCollough, Petitioner herein.

The District Court for the Eastern District of Texas, Beaumont Division, Honorable Joe J. Fisher, U. S. District Judge, entered judgment December 10, 1965, for reasons stated in his memorandum opinion (R. 20-21, 1964 A.M.C. 1258). The insurance company filed an appeal.

The question. — The district court and the deputy commissioner both found the Petitioner to have been injured upon the navigable waters of the Sabine River in the course of his maritime employment as a ship repairman at Levingston Shipbuilding Company. (R. 4-8). The single question raised by this case is—

Whether injury to a shipyard worker repairing a vessel, when it occurs upon an outfitting pier which was floating upon the navigable waters of the Sabine River, is an injury "occurring upon the navigable waters of the United States" within the meaning and coverage of the Longshoremen's Act.

The Petitioner asks this Court to grant writ of certiorari and to reverse the court below so as to hold that the injury was upon the navigable waters including any drydock, and thus within the jurisdiction of the federal act.

The deputy commissioner's proceedings. — At the hearing before the deputy commissioner, the insurance carrier and employer contested the Petitioner's Longshoremen's Act claim on the grounds (1) that his injury was exclusively within the Texas Workmen's Compensation Act and therefore his acceptance of payment of the $35.00 per week Texas Act maximum was a full satisfaction of all of the Petitioner's rights, and (2) that the federal Act should not apply "because the wharf or floating pier has been stationary for some 15 to 18 years and is permanently affixed to the land."

With respect to the question of characterizing the injury as "occurring upon the navigable waters", Mr. McCollough testified in his own behalf (R. 24-31), and the insurer and employer called Mr. Cecil R. Beeson, the employer's Vice-President and Director of Industrial Re-

lations (R. 33-36). Also received in evidence was a chart of that part of the river on which the floating pier was located (R. 37).

Both witnesses agreed and the deputy commissioner found that claimant, in the course of repairing a barge, was working back and forth between the vessel afloat and the outfitting pier alongside and that his injury occurred while he was temporarily on the outfitting pier, which was a permanent structure, consisting of floating "work barges", extending from the land over, above and upon the navigable waters of the river. As its name implies, the outfitting pier was a fixed wharf used primarily for the purpose of repairing vessels (R. 33-36).

The Petitioner testified that the pier was composed of "work barges" floating on the river, but permanently attached to the land and held in place throughout its entire length by piling clusters driven into the river bottom. It was used for shipyard work, not loading or unloading, and had always remained fixed stationary in the place where it was built during some 15 to 18 years previous. He also testified that his "entire location was upon the navigable waters" although his duties as helper to a sandblaster working on vessels required him at times to work back and forth between the vessels and the piers alongside (R. 26-28). The injury to the Petitioner's back occurred when he slipped while taking a hundred pound sack of sand from a truck or van, situated on the pier, in order to feed the sandblasting machine which supplied his blaster who was working on a barge alongside. (R. 24-32).

Mr. Beeson, testifying for the employer, explained it had a number of piers, several of which were floating. He described this outfitting pier in detail. It was 750

feet long and consisted of four separate floating steel barges, permanently affixed to the land by piling clusters at intervals throughout the length of the pier (R. 34-35, 36).

On the question of Mr. McCollough's acceptance of the $35.00 a week Texas compensation payments as a binding election, release or waiver of his rights to federal benefits, the only evidence was his own testimony on cross-examination by the insurer and employer. He stated that although his attorney filed claims under both the Texas and federal Acts he accepted the $35 Texas payments because, as he put it, "I had to or starve" (R. 31-32). No testimony as to election was offered by the employer and carrier.

On this evidence the deputy commissioner held the injury to be covered by the Longshoremen's Act and credited the employer and insurer with the payments made under the Texas Act, as authorized by law. He accordingly awarded Mr. McCollough the difference between that amount and the amount to which he was entitled under the federal act.

The district court proceedings. — The employer and insurer appealed to the United States District Court for the Eastern District of Texas to set aside the award of federal benefis to Mr. McCollough as not in accordance with the law. It specified numerous grounds (R. 12-15) which may be summarized: (1) Petitioner's compensation was validly and constitutionally covered" by the Texas Workmen's Compensation Act; (2) Petitioner's work was non-maritime and his employer was not engaged in maritime employment on navigable waters; and (3) Petitioner was not injured on navigable waters but on a wharf and

any wharf, dock or pier permanently attached to land "is just an extension of the land not within the terms" of the Longshoremen's Act and the deputy commissioner's jurisdiction.

The Petitioner and the deputy commissioner cross-moved for summary judgment. The district court entered judgment for the deputy commissioner, summarizing the facts in his memorandum opinion (R. 20, 1966 A.M.C. 1258):

> The deputy commissioner found as a fact that the claimant was injured upon navigable waters while assisting in repairing a barge when feeding a sand-blasting machine. This is fully supported by substantial evidence in the record considered as a whole. The evidence shows the claimant was working on a floating outfitting pier and was permanently anchored to the shore and bottom of the Sabine River by piling clusters. Claimant was promptly paid compensation at the scale provided by Texas law, but brought his claim for the additional amount due under the federal Act. The deputy commissioner allowed full credit for all payments as provided by 33 U.S.C. 914(k).
>
> Literally, "navigable waters" must include all necessary working places alongside vessels undergoing repairs. This includes places such as the floating pier, supported on barges, here involved, which extend from the land over and upon the water alongside the vessels and which are used as the work goes on back and forth between the pier and the vessel being repaired. The situation of shipyard employees working on a floating pier alongside a vessel afloat is no different from that of the same employees while working on dry land alongside a vessel on a marine railway.

With respect to the applicable law, the memorandum continues (R. 20-21, 1966 A.M.C. at 1259):

> Of the latter our Court of Appeals has said in Holland v. Harrison Bros., 306 F.2d 369, 372 (5th Cir. 1962), "any meaningful definition of marine railway should include the land immediately adjacent," and earlier in Maryland Casualty Co. v. Lawson, 101 F.2d 732, 733 (5th Cir. 1939), it said such adjacent land was included because "the land was part of the yard necessary to the operation of marine railway." Cf. Dixon v. Oosting, 238 F. Supp. 25, 29 (E.D. Va. 1965); United States v. Yee Nee How, 105 F. Supp. 517, 521-522 (N.D. Calif. 1952).

The insurer and employer appealed the decision of Judge Fisher to the Court of Appeals for the Fifth Circuit. Briefs were submitted to the court and oral arguments were held on February 24, 1967. In an opinion rendered by Goldberg, Circuit Judge, on August 9, 1967, the Court of Appeals reversed the decision of the District Court for the Eastern District of Texas and held that the petitioner did not have a claim under the Longshoremen's and Harborworker's Compensation Act, whereupon the petitioner appealed to this court for a writ of certiorari to review the decision of the lower court.

REASONS FOR GRANTING THE WRIT:

For a long period of time there has been considerable confusion in the lower Federal Courts over the overlapping jurisdiction of the Longshoreman's and Harbor Worker's Compensation Act and various state Workmen's Compensation laws. There have been numerous lower court decisions which have either held or denied federal jurisdiction, depending on particular fact situations. The num-

ber of these decisions is growing, and with each decision the confusion is compounded. Arguments for and against federal jurisdiction can be made by citing the same decisions. It has been long settled that there is a "twilight zone" where both the state and federal acts can apply, but there has never been a clear definition of the exact area of overlapping jurisdiction. There is no decision which defines the limits of federal jurisdiction under the Longshoremen's and Harborworker's Compensation Act. This case presents this Honorable Court with the opportunity to clear up the confusion that now exists regarding federal jurisdiction, and to put to rest the lively controversy that is raging between scholars, judges and attorneys.

Since this Court's decision in *Calbeck v. Traveler's Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196 (1962), it has been settled that the federal act is operative when state acts can be applied, and that coverage under the federal act is precluded only if the injury occurs outside the admiralty jurisdiction. It is undisputed that the location of the petitioner's injury was within the admiralty jurisdiction, but the act (Section 3 (a), 33 U.S.C. 902(a) also provides the benefits are payable "only if the disability or death results from an injury occurring upon the navigable waters of the United States". The question in this case is whether the respondent's injury occurred on the "navigable waters of the United States". There has been considerable controversy over what that language means, and a decision by this Court clearly defining "navigable waters of the United States" is badly needed. This case presents this Honorable Court with the opportunity to give such a definition.

Until reversed by the recent decision of the Court of Appeals for the Fifth Circuit, the petitioner had prevailed

before the Deputy Commissioner and the District Court in his position that his injury came within the jurisdiction of the federal act, and he submits that the court below erred in its decision. In this regard, the petitioner presents three points to this Court in support of his position. They are:

1. That his injury is within the jurisdiction of the Longshoremen's and Harborworker's Compensation Act because he was engaged in Maritime employment within the Admiralty Jurisdiction of the United States.
2. That in any event (even though the petitioner urges the broader doctrine), an injury occuring upon a floating outfitting pier is an injury upon the navigable waters within the meaning and coverage of the Longshoremen's Act.
3. That at any rate, the injury here occurred within the twilight area of legitimate doubt where the statutory presumption of coverage supports the petitioner's election and the deputy commissioner's award.

The petitioner will present written argument to the court with appropriate authority on each of these points in the order above listed.

I.

That his injury is within the jurisdiction of the Longshoremen's and Harborworker's Compensation Act because he was engaged in maritime employment within the admiralty jurisdiction of the United States.

The position of the Petitioner is that those engaged in maritime employment which come under the admiralty

jurisdiction of the United States are also under the jurisdiction of the Longshoremen's and Harborworker's Act. It is now no longer questioned that any longshoreman engaged in the loading or discharging of cargo vessels is "doing work in the service of the ship". This is now accepted law as announced in *Thompson v. Calmar Steamship Corporation,* 216 F. Supp. 234 (E.D. Pa. 1963), aff'd. 331 F.2d 657 (3rd Cir. 1964), cert. den. 379 U.S. 913, 85 S. Ct. 259; *Spann v. Lauritzen,* 344 F.2d 204 (3rd Cir. 1965); *Huff v. Matson Navigation Company,* 338 F.2d 205 (9th Cir. 1964); and *Gutierrez v. Waterman Steamship Corp.,* 373 U.S. 206, 83 S. Ct. 1185 (1963). The common sense rule seems to be that a longshoreman or ship repairman (such as McCollough) who is injured in the performance of work in any sense maritime in nature should come under the provisions of the Longshoremen's and Harborworker's Act. This is not only a sound rule of law, but any other rule would be inconsistent.

Longshoremen's Act jurisdiction over injuries occurring on a dock on navigable waters in the course of maritime employment of loading, unloading or servicing a vessel alongside the dock exists under admiralty jurisdiction as expanded by the principle laid down by this Court in *Gutierrez v. Waterman Steamship Corp.* (supra) and *Davis v. Department of Labor and Industries,* 317 U.S. 249, 63 S. Ct. 225 (1942).

The Admiralty Extension Act of 1948 provides that admiralty jurisdiction includes ". . . all cases of damages or injury to person or property, caused by a vessel on navigable waters *notwithstanding that such damage or injury be done or consumated on land*" (emphasis added),

and shall be determined "according to the principles of law and rules of practice obtaining the cases where the injury or damage have been done and consumated on navigable waters". In *Gutierrez*, this Court interpreted the Act as applying to all dockside injuries arising out of and in the course of a longshoreman's employment in the service of a vessel upon navigable waters along a wharf. This Court expressly rejected the contention that the Admiralty Extension Act applied to only "injuries actually caused by the physical agency of the vessel or a part of it". It held the act applied whenever the injury arose out of the "service of the ship" as a result of the impact felt on the adjacent dock.

Thus, in cases of a dockside injury of a longshoreman while in the scope of his employment of unloading or discharging cargo, this Court interpreted the Admiralty Extension Act as clearly applicable because the injury was caused by the Employee's maritime employment in the service of the ship.

Decisions prior to the Admiralty Extension Act cannot be of great help, as was noted by Judge Harrison L. Winter in *Boston Metal Company v. O'Hearne*, United States District Court of Maryland, June 20, 1963, U.S. D.C. (Dist. of Md.) Admiralty No. 4412; aff'd 329 F.2d 504 (4th Cir. 1964).

> "I think the Calbeck case equates, I think the legislative history (of the Longshoremen's Act) supports, and I think the decisions in this Circuit also support the concept that navigable waters of the United States means the admiralty jurisdiction of the United States, wherever it may be from time to time.
>
> . . . (T)rue, the Admiralty Extension Act was not passed until after the Longshoremen's and Harbor-

> workers' Compensation Act was passed, but I think that the Calbeck case makes perfectly plain that the application of the Longshoremen's and Harborworkers' Act was not to be frozen to the admiralty jurisdiction of the United States as it then existed in 1927, or as it was considered then to exist, but that rather there may be read into the Longshoremen's and Harborworkers' Act a more flexible concept that under subsequent legislation (by the Admiralty Extension Act) or as a result of subsequent Court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the Longshoremen's and Harborworkers' Act expands along with it."

This apparently is the reasoning of this Court in interpreting the Extension Act as evidenced by its discussion of the "unseaworthiness" doctrine in *Gutierrez*. This Court earlier recognized that both ships and wharves are on the water, and held the Jones Act applicable equally to dockside injuries and maritime employment as well as to those on board. There is no reason for not carrying out the congressional intention that the benefit of federal legislation for the maritime workers should be extended to the fullest extent of congressional power by giving a liberal and consistent reading of the words that Congress employed.

This Court has often stated that the Longshoremen's and Harborworker's Act must be interpreted so as not to bring about a harsh and incongruous result. It would seem indeed inconsistent to have two longshoremen or maritime workers injured or killed during the course of their employment, one standing on the deck of the vessel, and one on the dock, to have one of his family protected under the uniform provisions of the Longshoremen's and

Harborworker's Act and the other relegated to the provisions of various state compensation acts where the ship happens to be located at the particular time. This Court stated in *Reed v. The Yaka*, 373 U.S. 410, 83 S. Ct. 1349 (1963):

> "We have previously said that the Longshoremen's Act must be liberally construed in the conformance with its purpose, and in a way which avoids harsh and incongruous results. We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service."

It is submitted by the Petitioner that the "piers are extension of land" doctrine is historically erroneous and factually illogical when applied to defeat jurisdiction under the Longshoremen's Act. By reason of recent decisions and statutory law in the maritime field, it is no longer necessary to argue theoretically in support of that position. Because of the Admiralty Extension Act and the increasingly liberal holdings of this Court in the longshoremen third party and compensation cases, it is obvious that the old restrictive admiralty concepts are being discarded and broad new ones adopted. The Petitioner submits that the Longshoremen's Act must keep the pace of the times and as Judge Winter points out, its application must move along with the expanding admiralty jurisdiction of the United States.

The Petitioner submits that the Act should be applied with the utmost liberality. Reasons should be sought by

the Commission to grant awards under the umbrella of the coverage of the Longshoremen's and Harborworker's Act, and previous decisions and arguments which support the technical and overly legalistic argument "on the ship or gangway, federal, — on the pier, state" should be put to rest once and for all. Such technical distinctions do violence to:

(a) The legislative history,
(b) The protective purposes of the Longshoremen's Act,
(c) The long established principles of the interpretation of remedial statutes,
(d) The phenomenal growth of admiralty concepts in the almost forty years since the enactment of the Longshoremen's Act,
(e) The expansive influence of the extention of admiralty act, and
(f) The controlling authority of recent decisions.

The key words of jurisdictional coverage is "upon navigable waters" and not the restrictive "upon a ship"; or "floating free", or any other comparable interpretations that may be contended for by the insurer or employer. In selecting the expression "upon navigable waters", Congress did not intend to freeze the Act's coverage in conformity with the pre-1927 court decisions as to the extent of admiralty jurisdiction of dockside injuries any more than to concretize the "local concern" exception of that era. This Court explained in *Calbeck v. Travelers Ins. Co.* (supra):

> "In sum, it appears that the Longshoremen's Act was designed to insure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the sources, state or federal, of that remedy."

The Petitioner submits that all previous distinctions between injuries occurring on ships and between those on docks, wharves or piers be abolished, and asks that this Honorable Court reverse the Court of Appeals and hold that the maritime jurisdiction of the United States and the jurisdiction of the Longshoremen's and Harborworker's Act are synonymous.

II.

That in any event (even though the Petitioner urges the broader doctrine), an injury occurring upon the floating outfitting pier is an injury upon the navigable waters within the meaning and coverage of the Longshoremen's Act.

The Petitioner was injured while in the maritime employment of repairing a vessel; and the injury occurred upon an outfitting pier which was floating upon the navigable waters (approximately 32 feet deep) of the Sabine River. Since this "pier" actually consisted of connected "working barges", floating on those waters, it would seem apparent, as a matter of the natural use of the English language, that his injury was one "occurring upon the navigable waters." The Petitioner submits that Congress used that term in its natural sense, so as to provide coverage under the Longshoremen's Act to ship repairmen for injuries they receive while employed upon navigable waters. This case involves the same principle as in *O'Keeffe v. Atlantic Stevedoring Co.*, 354 F.2d 48, 50 (5th Cir. 1965), where the court said:

> An award under the Act is to be sustained if it can be supported by a reasonable argument. *Holland v. Harrison Bros.*, 306 F.2d 369 (5th Cir. 1962). The

> argument supporting the commissioner's award in this case seems not only reasonable, it appears to be conclusive.

The Act's background, purpose, language and prior interpretation all support the validity of the award of federal benefits here.

The occasion and necessity for the Longshoremen's Act were a series of cases decided by the Supreme Court concerning the application of state law within the admiralty jurisdiction. In *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917) the Court ruled that federal maritime law occupied the area of admiralty jurisdiction conferred upon the federal government by Article III, Section 2, of the Constitution; and held that state workmen's compensation laws could not constitutionally be applied to an injury occurring upon navigable waters within the federal admiralty jurisdiction to an employee engaged in maritime employment, because to do so would destroy the uniformity of the federal maritime law which the Constitution was intended to establish. The employee injured in *Jensen* was a longshoreman engaged in unloading cargo, and the injury was sustained on a gangplank over navigable waters between the vessel and the wharf. 244 U.S., at 208; see *Calbeck v. Travelers Ins. Co.,* supra, at 370 U.S. 114, 117. Two federal statutes designed to permit the application of state workmen's compensation statutes to injuries in maritime employment upon navigable waters were later held to be unconstitutional. *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920); *Washington v. Dawson,* 264 U.S. 219 (1924).

Perhaps in heed of the criticisms leveled at its decision in *Jensen and Knickerbocker,* and in recognition of the

harsh results engendered by them, this Court formulated the "local concern" doctrine which permitted workmen to recover under state workmen's compensation laws for injuries occurring upon navigable waters within the admiralty tort jurisdiction, provided that the activities and contracts of maritime employment of the employees affected were matters of mere "local concern", not directly related to navigation or commerce. This court reasoned that in such circumstances the application of state procedures and remedies would not destroy the uniformity of the federal maritime law required by the Constitution. *Grant Smith-Porter v. Rohde*, 257 U.S. 469 (1922).

At the same Term, this Court held that state workmen's compensation could be applied, without reference to the "local concern" doctrine by direct operation of state law for injuries occurring upon extensions of land into navigable waters, such as piers and wharves, because injuries upon land and such extensions of land were within the recognized non-maritime area of state jurisdiction. *Industrial Commission v. Nordenholt*, 259 U.S. 263 (1922) (injury to longshoreman working on a pier).

In the context of these decisions, the Longshoremen's Act was drafted and adopted. As originally drafted, and sponsored by the International Longshoremen's Association and unions representing ship repairmen and allied trades, the bill would have applied to "any employment performed *on a place* within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation or commerce * * *." Hearings on S. 3170, Senate Judiciary Committee 69th Cong., 1st Sess., p. 2 (hereafter "Senate Hearings"). In that form, the bill was apparently designed to provide coverage only for injuries within the admiralty juris-

diction which were not compensable under stateworkmen's compensation acts, whether applying to their own force or under the new "local concern" doctrine.

Both the Senate and House reports made clear the Congressional intent to provide compensation coverage for workers injured in the course of repairing vessels. S. Rep. 973, 69th Cong., 1st Sess., p. 16, H. Rep. 1190, 69th Cong., 1st Sess., p. 1. And the particular concern of Congress that such workers' injuries be included within the coverage of the Act is demonstrated by the parenthetical phrase "including any drydock" which it appended to the words "upon the navigable waters of the United States." For by making the test of coverage "upon the navigable water of the United States (including any dry dock)", Congress made clear its intent to cover all injuries upon drydocks (the facility) traditionally and most commonly used for repairing vessels, even if there might be some doubt as to whether a drydock was otherwise "upon navigable waters."

As the statutory language and legislative history imply, and *Calbeck v. Travelers Ins. Co.*, (Supra), has now held, this limiting clause was not designed to exclude from federal compensation coverage injuries occurring in maritime employment within traditional admiralty jurisdiction, but to which the traditional "maritime but local" or the new "local concern" doctrines had permitted the substitution of state compensation remedies. The Congressional purpose was, as the Court notes, "to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." 370 U.S. at 117. The Longshoremen's Act plus thus applies to all injuries oc-

curring in maritime employment upon navigable waters even though, because of the nature of the employment or the place of injury, the admiralty law had permitted state workmen's compensation statutes to be applied to such injuries in maritime employment under the local concern doctrine.

Since the employer here was concededly one whose employees are engaged in maritime employment upon the navigable waters, and the injury here was one which concededly arose out of the Petitioner's employment on navigable waters as a ship repairman, the only issue as to the coverage of the Act is whether his injury occurred at a place which is "upon the navigable waters of the United States (including any drydock)" within the meaning of the Longshoremen's Act. As we noted above (*supra,* pp. 3-4, 7) the deputy commissioner and the Court ruled, the physical facts, which show that the injury occurred on a "working barge" which was floating on approximately 32 feet of water of the navigable waters of the Sabine River, indicate clearly that the answer to that question is affirmative. That the "work barge" was tied to other "work barges" to form a floating outfitting pier, attached to the land and held in place by pilings, does not detract from those physical facts. When an injury occurs to a worker on a vessel or other structure supported by the navigable waters of the United States, that injury occurs "upon the navigable waters" within the meaning and coverage of the Act. *O'Keeffe v. Atlantic Stevedoring Company,* (supra), 354 F.2d at 48, 50 (injury to longshoreman, occurring over a wharf, held covered by the Act, because he was being lifted by the ship's gear).

The purpose and legislative intent equally support the views of the deputy commissioner and the district court. For, as we have shown, Congress intended the Longshoremen's Act to cover all injuries to amphibious workers upon navigable waters, and was particularly careful to include the phrase "including any dry dock" so as to be sure to provide a remedy under the Act in all cases for ship repairmen, who usually perform their duties about such structures. And while the outfitting pier here was not a traditional form of "dry dock", it had a similar function (*i.e.*, the repair of vessels). See *Avondale Marine Ways v. Henderson,* 346 U.S. 366, 367 (1953), (concurring opinion); *Port Houston Iron Works v. Calbeck,* 227 F. Supp. 966, 967 (S.D. Tex. 1964). Thus, as the court below noted, if injuries to ship repairmen occurring in a graven drydock on dry land or upon the dry land alongside a maritime railway are injuries "upon navigable waters of the United States (including any dry dock)", so as to be within the coverage of the Longshoremen's Act, it is difficult to see why injury upon an outfitting pier, which is floating upon the navigable waters, is not equally an injury "upon navigable waters (including any dry dock)", covered by the Act. *Holland v. Harrison Bros.,* (supra), *Avondale Marine Ways v. Henderson,* (supra), *Maryland Casualty Co. v. Lawson,* 101 F.2d 732, 733 (5th Cir. 1939); *Continental Casualty Co. v. Lawson,* 64 F.2d 802, 805 (5th Cir. 1933).

None of those considerations apply to the floating "outfitting pier" which was the locus of the injury here. Since such structures, like many drydocks, float upon the navigable waters and are used for the repair of vessels, it was not at all certain that they would have been considered within the compensation jurisdiction of the states

at the time of the passage of the Act. On the contrary, since they floated upon navigable waters, injuries in maritime employment upon them were probably within the traditional maritime tort jurisdiction. And since the repair of vessels was traditionally work subject to admiralty contract jurisdiction, it is probable that, prior to 1927, the Court would have held that the federal admiralty remedies were exclusive of state compensation. E.g., *Great Lakes D. & D. Co. v. Kierejewski,* 261 U.S. 479 (1923); Messel *v. Foundation Co.,* 274 U.S. 427, 434 (1926).

The coverage of the repairman's injury here thus falls clearly within the overall Congressional purpose of providing a compensation remedy for all those injuries for which the prior Supreme Court decisions "had rendered questionable the availability of a state compensation remedy." *Calbeck v. Travelers Insurance Co.,* (supra). And while we have found no legislative history pertaining specifically to shipyard structures of this kind, both the particular regard of Congress for ship repairmen and the broad statutory language "upon the navigable waters of the United States (including any dry dock)" confirm the Congressional intent to cover repairmen's injuries occurring upon them.

The Petitioner submits that a shipyard employee who performs his work on a floating barge which is anchored by piling is no different from a man that does precisely the same job on a marine railway. The mere fact that the location of such repair facilities are not identical should have no bearing on whether or not there is coverage under the Act; the fact that the men involved do the came type of work should make a distinct difference. The Petitioner submits that it would be manifestly unjust to hold that a man injured while working on a sandblast-

ing operations on a marine railway is covered by the Longshoremen's and Harborworker's Act, and that a man working on a sandblasting operations on a floating barge anchored by pilings is not.

In *Holland v. Harrison Bros.*, supra, which Judge Fisher cited in his opinion, this Court held that a sandblaster working on a marine railway four hundred feet from the shore was covered by the Act, even though he was on land next ot a marine railway. The Court said "any meaningful definition of marine railway should include the land immediately adjacent". The *Holland* case comes within the "including any drydock" provision of the Act, and this case concerns the construction that should be given to "Navigable Waters", but the act must be given a liberal construction in order to avoid inconsistencies. As stated by this Court in *Reed v. The Yaka*, supra, and previously quoted:

> "We have previously said that the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service."

The same principle should be applied to workers doing the same job.

The *Reed v. Yaka* rule was recognized in *Holland*, and the Petitioner respectfully submits that it should be recognized in this case.

Petitioner contends that injuries on piers, docks, floating barges and other such extensions of land "are over, above, in and upon the navigable waters" and are plainly with the coverage of the Federal Act. In *Dixon v. Oosting*, (supra), which involved an injury on a piling cluster not yet incorporated into a bridge, the Court said:

> "Unless the Longshoremen's Act must be so strictly construed as to mean that there can be no compensable injury unless the injured party comes in contact with the water—a statement that needs no citation of authority to refute—the injury was clearly compensable under the Federal Act."

The present case of a floating dock is an even stronger case than *Dixon*.

It is also familiar that, because they are extensions of land, over, above, in and upon navigable waters, piers and their equipment, such as hoppers, cranes, etc., used in loading cargo or by persons going to and from the vessels, are appurtenancies within the ordinary conception of vessels on navigable waters. Thus in *United States v. Yee Nee How*, 105 F. Supp. 517 (N.D. Calif. 1952), the Court said:

> "Here, for the purposes of a statute assigned to effectuate enforcement of the customs laws, the word 'vessel' includes the pier to which a vessel is tied up. The 'spirit' of the law controls the 'letter' when the two are in conflict."

The sole requirement of the statute is that the incident occur upon the navigable waters.

It would be strange to hold that Congress in employing the expression in the 1927 Act intended to exclude those

injuries occurring upon a dock on navigable waters and to include only those occurring on a ship on navigable waters. Both ships and wharves and floating docks are on the water. There are a number of cases supporting the common sense statement that "upon" does not necessarily mean "afloat", but also "along", "adjoining", "adjacent to", or even "near". Thus, "a wharf or a pier is a place on a river or other navigable waters", *Meyers v. Kansas City,* 323 Mo. 200, 18 S.W.2d 900 (1929); "piers are confined to navigable waters" *In Re: Waterfront,* 122 Misc. 863, 205 N.Y.S. 56 (1924); *City of Oakland v. Hogan,* 41 C.A.2d 333, 106 Pacific 2d 987 (1940). Injuries on a dock or a wharf upon navigable waters is as much upon navigable waters as is an injury on the deck of a ship. A liberal, practical application of the Longshoremen's Act should be that its coverage is co-extensive with the broadest meaning of the statutory phrase, "upon navigable waters". Such a construction is in line with the repeated injunction of this Court to a liberal, non-technical construction of the Act. (*Reed v. The Yaka,* supra)

The time-worn, old arguments which attempt to distinguish between different types of piers, docks and wharves or between different types of mechanical apparatus which happen to be in use at the time of a man's injury should be rejected by this Court. It is unthinkable that Congress intended to make such technical and legalistic distinctions when the Act passed in 1927. The statement made in explanation of the bill by Congressman La Guardia of New York, on March 2, 1927, just two days before the Longshoremen's and Harborworker's Act became law is particularly apt:

> "Mr. Speaker, it is quite possible to explain the purpose and necessity of this bill in two minutes. . . .

> Owing to our dual form of government we find that longshoremen are employed by companies or individuals engaged in foreign or interstate commerce, and therefore, there is some question whether or not state law could be made applicable to them. In order to meet this situation, it is necessary to pass a federal law. This is what they are doing now. This law simply gives the longshoremen the benefit of up-to-date legislation *to cover injuries sustained in the course of their employment. That is all there is to it.*" (68 Cong. Record 5414)

This clear statement has been rejected as too liberal for over forty years, and parties have resorted to unbelievable gyrations in order to get around the intent of the Act. The floating dock which is the subject of controversy in this case is literally upon navigable waters, and the Petitioner asks this Honorable Court to affirm the District Court's decision holding that James D. McCollough's injury is within the jurisdiction of the Longshoremen's and Harborworker's Compensation Act.

III.

At any rate, the injury here occurred within the twilight area of legitimate doubt where the statutory presumption of coverage supports the claimant's election and the deputy commissioner's award.

For the foregoing reasons, the petitioner submits that his injury in this case, occurring over, above and on the navigable waters, upon a "work barge" supported by the floating on those waters, was clearly an injury occurring "upon the navigable waters" within the meaning and coverage of the Longshoremen's Act. If any doubt remains, however, it should be resolved in favor of sustaining the

deputy commissioner's award, and the claimant's choice of Longshoremen's Act compensation.

In *Davis v. Department of Labor* (supra), this Court recognized that the prior decisions concerning the scope of federal admiralty jurisdiction had created for the amphibious maritime worker a "twilight zone" where it was "extremely difficult" to determine whether the state or federal compensation remedy was applicable. 317 U.S. at 253, 256. If the worker were forced to choose between the two in advance, he would face not only the serious financial loss and delay of litigation, but also the possibility of having his claim barred by limitations if he chose erroneously. 317 U.S. at 254. This dilemma would frustrate the very purpose of workmen's compensation, which was to provide a swift, certain and inexpensive remedy. To avoid that dilemma, this Court relied upon two presumptions: the presumption of the constitutionality of state workmen's compensation law to sustain a claimant's choice of the state remedy; and the statutory presumption of coverage, Sec. 20(a), 33 U.S.C. 920(a), to sustain a claimant's election of compensation under the Longshoremen's Act. 317 U.S. at 254, 256-257. Accordingly, the Supreme Court ruled, a deputy commissioner's decision that "a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error." 318 U.S. at 256-257.

As this Court later observed, this "twilight zone" doctrine announced in *Davis,* gave the workers injured within it the right to recover compensation under either the Longshoremen's Act or the workmen's compensation law of the state. *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273 (1959). And, in every case presented to

it thereafter, the Supreme Court has sustained the claimant's recovery. See e.g., *Avondale Marine Ways v. Henderson,* supra, where the Court in a *per curiam* opinion citing the *Davis* case, *supra,* sustained a deputy commissioner's award under the Longshoremen's Act for an injury to an employee who was killed while engaged in the repair of a barge which was on a marine railway on dry land, approximately 400 feet from navigable waters; *Calbeck v. Travelers Ins. Co.,* supra.[1]

The exact scope of the "twilight zone" has never been authoritatively defined by this Court, and a definition is needed. The area was in all probability designed to include within a wide circle of doubt all waterfront cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way." *Moore's Case,* 323 Mass. 162, 167, 80 N.E.2d 478, aff'd *per curiam sub. nom. Bethlehem Steel Co. v. Moores,* 335 U.S. 874 (1948).

The petitioner here was injured, while engaged in repairing a vessel, when he was on a structure which was floating upon the navigable waters. While that structure was denominated as a "pier", it was in fact simply a series of connected "work barges", floating upon the Sabine River. And while it bears some resemblance to a traditional pier, neither its physical characteristics nor its function was that of a traditional cargo pier or wharf. For in both these respects, it more closely resembled a drydock, injuries upon which, of course, are expressly cov-

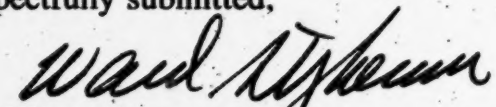
1. In *Calbeck,* itself, of course, the injury was on a vessel afloat upon navigable waters. It was therefore conceded that the injury occurred upon navigable waters, and within the admiralty tort jurisdiction. There was, therefore, no occasion for the Supreme Court to rely upon the twilight zone doctrine to sustain federal jurisdiction of the place of injury.

ered by the Act. For these reasons, as more fully stated above (*supra*, pp. 3-4, 7, 16), the petitioner believes that the injury here occurred "upon the navigable waters of the United States (including any dry dock)" within the meaning and coverage of the Act. Surely, in these circumstances the deputy commissioner has authority to effectuate the remedial purposes of the Act. His ruling was not one of "apparent error", and should be sustained. *Davis v. Department of Labor*, supra; *O'Keeffe v. Atlantic Stevedoring Co.*, supra.

CONCLUSION

In order to clarify the issue of the jurisdiction of the Federal Longshoremen and Harborworkers' Compensation Act and in order to determine the meaning of "navigable waters of the United States" as set out in that act, and to resolve the conflict between the many existing decisions regarding jurisdiction, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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